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Supreme Court's Verdict on Section 377 of IPC: An Analysis

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Abstract: ***This paper explores the analysis of Section 377. It explores how Section 377 has been read down and how it became the subject matter for debate. The paper starts with the brief introduction as what does Section 377 says about, to whom it deals with and who are the LGBTs and what does it means. The paper explores the history of emerging of Section 377 into the realm of the Court scenario. The intention of this paper is to find out that whether the decision of Supreme Court on decriminalising homosexuality is fair or not? The paper informs an important cultural concern to think over debate on Section 377 and the cases related to it. The present paper looks into the minute details of homosexuality and morality from a contemporary individual's point of view. It analyses the positive as well as negative impact on the society.***

1. Introduction

In India, most of the laws are given by the Britishers. One of the most recently debateable provision of penal law that is law dealing with the unnatural sexual offences in India comes under the ambit of Section 377 of Indian Penal Code which is also a gift from British rule. Section 377 is the section of Indian Penal Code introduced in 1864 during the British rule. It is modelled on Buggery Act of 1533 by theParliament of England during the reign of King Henry VIII, it is used to criminalise sexual activities "against the order of nature".

The common law in England first recorded Sodomy as a crime which was written in the Fleta, 1290, and later in the Britton, 1300. [1] Both these texts prescribed that sodomites should be burnt alive. [2] Later by the enactment of Buggery Act, Acts of sodomy became penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by QueenElizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British Colonies. [3]

The Buggery Act was passed with the objective to empower the government to check sodomy and bestiality and provided with the punishment who violates it. Before the Buggery Act, the offences related to sodomy and bestiality were dealt with by the Church Courts. The Priests used to decide the matter and punished the persons who indulged in sodomy and bestiality. [4]

The section was formulated in 1860 by Lord Macaulay, the then President of Law Commission. As it the British law, it is common in many countries which were the colonies of the Britain. This law was also applicable in England but later in the year of 1967, British decriminalised homosexuality back by-passing Sexual Offences Act. [5]

2. What is Section 377?

Section 377 of Indian Penal Code of 1908 reads as:

"**Unnatural Offences** - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Section 377 treats consensual sexual acts by adults of same sex as an offence and provides punishment with imprisonment of
life.

2.1 Why does Section 377 Matter?

Section 377 penalises a section of people for being a sexual minority. The people of sexual minorities and class of vulnerable people approached the Supreme Court against the penal provision. They were not just seeking protection as sexual minorities, but also asking for the recognition of characteristics inherent in all human beings. They argue that the right to sexuality, sexual autonomy and freedom to choose a sexual partner form the cornerstone of human dignity. [6] Section 377 has a "chilling effect" on the right of equality, liberty, life, dignity and non-discrimination on the ground of sex. [7]

On September 6, 2018, the Supreme Court of India announced the application of Section 377 to consensual homosexual sex between adults was unconstitutional and decriminalised a portion of Section 377 of the Indian Penal Code. [8]

In July 2009, in a landmark judgment of *Naz Foundation v. Govt. of NCT of Delhi* [9], the Delhi High Court struck down a portion of Section 377 as unconstitutional and as a violative of the fundamental rights *i.e.* Article 14, 15 and 21 guaranteed by the Indian Constitution, with respect to gay sex and held applicable only to non-consensual, penile, non - vaginal sex, sexual acts and force relating acts by adults with minors.

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Following this, religious groups moved the Supreme Court for a direction against the verdict. A two-judge Bench of the Supreme Court of India, on appeals filed by private parties, set aside the High Court's judgment on 11 December 2013 in *Suresh Kumar Koushal v. Naz Foundation* [10]. The Court held that amending or repealing Section 377 should be a matter left to Parliament, not the judiciary. It upheld the criminalisation of gay sex while virtually denying the LGBTQ community the right to sexuality, sexual orientation and choice of partner.

On 6 February 2016, a three-member bench of the Court reviewed curative petitions submitted by the *Naz Foundation and others*, and decided that they would be reviewed by a five-member constitutional bench.

In July 2018, a Constitution Bench, led by former Chief Justice of India Dipak Misra, re-opened the entire issue, saying a section of people could not live in fear of the law which atrophied their rights to choose, privacy and dignity.

a) Religious Perspective on Homosexuality

Homosexuality has been prohibited almost in all the religious beliefs and traditional law codes. In Ancient India, the acts of homosexuality were to be considered as more a question of morality than a problem of law.

India had no codified law for the homosexuality practices before IPC was drafted and enforced. But religious texts and codes were the only possible guide for deciding the homosexual acts. These acts were considered as the prism of morality. [11]

In Hinduism, Religious texts and codes also have some references of homosexuality. The Manusamriti describes Gay sex as a crime. It involves punishment by performing certain prescribed rites for the purification of body and soul. If a person, who indulged into some homosexual acts, failed of getting purified, then it led to the loss of his caste. [12]

The Arthshastra of Kautilya (written between 2nd century BCE and 3rd century CE) also imposed the duty of the King to punish those persons who indulge into some acts of homosexuality. [13]

Quran considers the acts of homosexuality as 'Wrath of God'. Traditional Islamic Jurisprudence prohibits lustful carnal acts and provides punishment of death penalty for the same. [14]

Bible has some references to Homosexuality. In fact, the term 'Sodomy' originates from Bible which refers to acts of carnal intercourse as Sodom. But despite of various references of Sodomy in Bible, Bible does not encourage any acts related to gay sex or acts of homosexuality or acts of carnal intercourse. [15]

b) How did Section 377 Come Up as an Issue?

Section 377 is 150 years old law which provides the penal provisions forhomosexuality. It had so many twists and turns, ups and downs in ensuring rights of equality, life, dignity, liberty and non-discrimination on the ground of sex.

AIDS Bhedbhav Virodhi Andolan (in English: AIDS Anti-Discrimination Movement), also known as ABVA is the India's 1st AIDS activists movement established in 1988 in New Delhi. It is an NGO fighting discrimination against those who are affected by HIV or AIDS and those who are targeted as High-Risk groups which includes women in prostitution, professional blood donors, drug abuse and LGBT Community.

During November-December, 1991, AIDS Bhedbhav Virodhi Andolan published a report 'Less than Gay: A Citizens Report on Status of Homosexuality in India'. The 70 pages report is based on the status of Gay people, lesbians and other sexual minorities and demands equal benefits and Rights for the queers.

AIDS Bhedbhav Virodhi Andolan v. Union of India and Others [16]*:* In May, 1994, ABVP filed writ petition through its member Ms. Shobha Aggarwal, also advocate in the Delhi High Court, challenging the Constitutional Validity of Section 377 of IPC, demanding condoms to be made available to inmates of Tihar Jail in New Delhi. Kiran Bedi, the Inspector General and the Superintendent of Tihar Jail, had refused to allow health workers to distribute condoms to male inmates, saying allowing condoms would encourage homosexual acts. In response to this, ABVA, through writ petition filed, demanded free condoms be provided. However, the petition was dismissed in 2001.

This was the very first beginning which took place in the battle against homosexuality.

In 1998, The movie 'Fire' directed by Deepa Mehta, starring Shabana Azmi and Nandita Das, depicts a lesbian relationship. After the release of the film, certain organisations staged protests forcing cinemas to stop screening the movie. [17]

Naz Foundation (India) Trust, like ABVA, is a non-governmental organisation and community-based organisation, popularly known as Naz India. It was founded in the year of 1994 in New Delhi. It works on the issues related to HIV/AIDS and issues related to sexual health for men having sex with men (MSM). [18]

In December, 2001, Naz Foundation filed PIL in Delhi High Court seeking repeal of British-era Section 377 IPC as violative of Article 14 (Right to Equality), Article 15 (Prohibition of discrimination on grounds of sex), Article 19 (Right to Freedom) and Article 21 (Right to Life and Liberty) and also demanded the legislation of homosexuality.

Three years later, on September 2, 2004, A Division Bench of Chief Justice B. C. Patel and Justice Badar Durrez Ahmed dismissed the petition challenging constitutional validity of Section 377 of IPC on the ground that there was no cause of action to entertain it and the plea cannot be maintained because it is mere academic issue.

A few months later, A Review Petition was filed by Naz Foundation which was dismissed too. The Naz Foundation

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challenged both orders and the writ petition were remitted for a fresh decision in 2006.

Naz Foundation v. Government of NCT of Delhi [19]*:* In February 2006, After High Court dismissed petition in 2004, the petitioners moved to Supreme Court and filed Special Leave Petition. Supreme Court asked High Court to reconsider the dismissed petition on the ground that the petition involved and issue of Public Interest and that should be entertained. Subsequently, Women's and Human Rights activists, Voices Against 377, a coalition of NGOs involving Gender and Child Rights groups, joined the petition and became an intervening party.

According to Naz Foundation, Section 377 IPC creates a class of vulnerable people that is continuously victimised and directly affected by the provision of Section 377. It further submitted that Section 377 is violative of Articles 14, 15, 19, and 21 of the Indian Constitution. The LGBT Community is experiencing discrimination, denial of Fundamental Rights and continuous harassment and abuse. They also submitted that the expression "sex" as used in Article 15cannot be read restrictive to "gender" but includes "sexual orientation" and, thus read, equality on the basis of sexual orientation is implied in the said fundamental right against discrimination. [20] It has been submitted that there is a case for consensual sexual intercourse (of the kind mentioned above; i.e. homosexual) between two willing adults in privacy to be saved and excepted from the penal provision contained in Section 377IPC. [21]

In contradiction, the Centre Government including the Ministry of Home Affairs under Shivraj Patil and National Aids Control Organisation (NACO), a division of Ministry of Health and Family Welfare under Dr. Anbumani Ramadoss, filed separate affidavits. While Ministry of Home Affairs argued against decriminalisation of Section 377, on the other hand, NACO argued for the criminalisation of Section 377 hindered efforts to HIV/AIDS. the centre Government further argued that Gay Sex is immoral and decriminalisation of homosexuality would cause moral degradation of society.

In a 105-pages Judgment, A Division Bench of Justice A. P. Shah and Justice S. Muralidhar, on July 2, 2009, in the landmark judgment of *Naz Foundation v. Government of NCT of Delhi* [22], stated that Section 377 violates Article 14, 15 and 21. The Delhi High Court decriminalised the consensual sexual acts of same gender and held penal provision as 'illegal'. The Court did not strike down Section 377 as a whole and decriminalised a portion of Section 377 of the Indian Penal Code.
The High Court held, "We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution." [23] The Court further held, "The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors." [24]

Following this, during 2009 – 2012, religious groups and individuals challenge decriminalisation verdict and moved Supreme Court for a direction against the verdict. However, fifteen Special Leave Petitions were filed before the Apex Court by several religious groups from all over the country. Seven Intervention Applications were also filed, out of which five were in support of the High Court decision while two were against it.

In 2013, the Supreme Court upheld the Constitutional validity of Section 377 and set aside the 2009 verdict of the Delhi High Court and reinstated Section 377 of IPC in the case of *Suresh Kumar Koushal v. Naz Foundation* [25], stating that the judicial intervention is not required. The Apex Court further said that it is duty of the Parliament for deciding whether to amend or repeal the Section.

Suresh Kumar Koushal is an Astrologer and runs Tarunaditiya Astrological Centre in New Delhi. He challenged 2009 verdict of the Delhi High Court. His challenge was directed by a consideration that it is a religious issue and its rebuttal was required. [26]

In 2009, Delhi High Court accepted the arguments of Naz Foundation that consensual same-sex sexual relations between adults should be decriminalised, holding that such criminalisation was in contravention of the Constitutional rights to life and personal liberty, equality before the law and non-discrimination.The decision of Delhi High Court was challenged and appealed to the Supreme Court by large number of individuals and organisations including interveners for appellant who stated that the moral, cultural and religious values of Indian society are to be protected and interveners for the Respondents argued that Section 377 caused harm to the LGBT community and particularly to the homosexual men.

According to the Appellants, the decision of High Court lacked documentary evidence which proved that LGBT Community facing discriminatory treatment by the law. They further stated that Section 377 controls the HIV/AIDS from spreading and decriminalisation of the Section would adversely increase the rate of HIV/AIDS. They further stated that Section 377 is gender neutral and covers voluntary acts of carnal intercourse against the order of nature irrespective of the gender of the persons committing the act. They submitted that Section 377 does not violate the right to privacy and dignity enshrined under Article 21 of the Indian Constitution. They further argued that the judgment of Delhi High Court would affect the institution of the marriage and it would prone young people to indulge into homosexual activities.

On the contrary, the Respondents argued that sexual rights are guaranteed under Article 21 of the Indian Constitution. They stated that criminalisation of activities of sexual intercourse between homosexual men would impact these people and would restrict their right to dignity, personhood and identity, equality and right to health. They further stated that sexual intimacy is important for psychological wellbeing and homosexuals are deprived of this. They also submitted Section 377 is vague and it resulted in the continuous harassment and abuse of LGBT persons.

On December 11, 2013, a two-Judge Bench of Supreme Court allowed the appeal and set aside the earlier decision of

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Delhi High Court in 2009. The Division Bench of Justice G. S. Singhvi and Justice S. J. Mukhopadhaya declared the decision of High Court as unconstitutional and non-violative of Article 14, 15 and 21 of the Indian Constitution.The Supreme Court said, "Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable." [27] The Court further held, "we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377IPC from the statute book or amend the same." [28]

On 18 December 2015, Lok Sabha member Shashi Tharoor of the Indian National Congress, had expressed support for LGBT Rights, introduced a private member's bill to replace Section 377 in the Indian Penal Code and decriminalise consensual same-sex relations. The bill was defeated in first reading. In March 2016, Tharoor tried to reintroduce the private member's bill to decriminalise homosexuality, but was voted down for the second time.

In August, 2017, in *Justice K.S. Puttaswamy vs Union of India*, Supreme Court upheld right to privacy, and said sexual orientation was an "essential component of identity" and rights of LGBTQ persons were "real rights founded on sound constitutional doctrine".

In January, 2018, the Supreme Court said a larger group of judges would re-consider the previous judgment and examine Section 377's constitutional validity. In July, 2018, Supreme Court of India further said that it's up to the bench to take a call on 150-year old ban on gay sex.

On September 6, 2018, Supreme Court of India decriminalises homosexuality.

c) The Supreme Court's 2018 Verdict

In 2018, in a landmark judgment of *Navtej Singh Johar v. Union of India*, the matter was heard from 17 January, 2018, the five-judge constitutional bench of the Supreme Court of India consisting of former Chief justice Dipak Misra started hearing the challenge to constitutionality of section 377. The bench ended its hearing on 17 July and reserved its verdict, asking for both sides to submit written submissions for their claims by 20 July.

On 27 April 2016, five people from the LGBT community filed a new writ petition in the Supreme Court challenging the constitutionality of Section 377 of the Indian Penal Code. The petitioners claimed that the issues which they raised in their petition were varied and diverse from those raised in the pending curative petition in the 2013 *Koushal v. Naz* case, in which the Supreme Court had upheld the constitutionality of Section 377. The Naz case was earlier referred to a five-judge bench in order to decide whether the curative petition could be accepted for consideration. The petitioners were dancer Navtej Singh Johar, journalist Sunil Mehra, chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri, and businesswoman Ayesha Kapur. Specifically, it happened to be the first case where the petitioners had argued that they had all been directly aggrieved because of Section 377 alleging it to be a direct violation of fundamental rights.

On 6 September 2018, the court delivered its verdict, declaring portions of the law relating to consensual sexual acts between adults unconstitutional in a unanimous decision. This decision overturns the 2013 ruling in *Suresh Kumar Koushal vs. Naz Foundation* in which the court upheld the law. However, other portions of Section 377 relating to sex with minors, non-consensual sexual acts, and bestiality remain in force.

The apex court found the criminalisation of sexual acts between consenting adults violated the right to equality guaranteed by the Constitution of India.

3. Analysis and Observations of the Verdict

By analysing and observing the verdict of Supreme Court of India, there comes positive impacts as well as negative impacts on society. From positive point of view, the verdict will have its significance in coming time because people think of its importance. Some people are on the opposition regarding this verdict, as they think it will have negative impacts on the society.

3.1 Positive perception

- **Ensure Fundamental Rights:**
  This decision of Supreme Court for decriminalising homosexuality under section 377 of Indian Penal Code, has ensured fundamental rights *i.e.* Article 14, 15 and 21 guaranteed in the Indian Constitution. By this, LGBTQ community will enjoy their right to choose, rights of equality, right to life and liberty, right to live with dignity and non-discrimination on the basis of sex. The Hon'ble Supreme Court found the criminalisation of sexual acts between consenting adults violated the right to equality guaranteed by the Constitution of India. The Constitution Bench, led by former Chief Justice of India Dipak Misra, said that a section of people that falls under the community of LGBTQ could not live in fear of the law which takes away their rights to choose, privacy and dignity.
- **A portion of sec 377, still criminalised:**
  Although in a landmark judgment of *Navtej Singh Johar v. Union of India*, the Supreme Court of India has announced the application of section 377 to consensual homosexual sex between adults to be unconstitutional and decriminalised a portion of Section 377 of the Indian Penal Code with respect to gay sex. But a portion of it to be held criminalised and applicable only to non-consensual, penile, non - vaginal sex, sexual acts and force relating acts by adults with minors. A portion of it is still held to be criminalised, that is why, it plays a vital role in the Indian society. Because it is only applicable to gay sex only, and any acts which is done without the consent or any act done with force or threat by any person with minors are considered to be criminal acts and held punishable.

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- **Principle of autonomy:**
  A cardinal principle which the Court discussed was that of autonomy. This principle states that under a constitutional scheme, the individual has sovereignty over person's own body. A person can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is matter of their choice. Hence, individuals have their autonomy by their free will in a private setup, they should also be allowed to engage in a sexual activity of their choice.
- **No discrimination on the ground of sex:**
  By decriminalising homosexuality, the Supreme Court has given fundamental rights under article 14, 15 and 21 of the Indian Constitution to the individuals belonging to LGBTQ community. It ensures every LGBTQ person to be equally treated and it provides no discrimination on the ground of sex.

3.2 Negative perception

- **Impact on society as it is unethical and immoral:**
  Apart from positive aspects, there are negative points which considered this judgment to be against the moral values. Some oppositions are of view that this verdict will bring negativity in the society because it is against the cultural values. Because Indian society is known for its culture, beliefs, ethics and moral values. By decriminalising section 377 and considering it to be as fundamental right of the LGBTQ community, the consensual intercourse between the persons of same sex is against the nature and hence it is unethical and immoral.Even many religious opined that their religion did not favour these kinds of acts. They believed unnaturalness of homosexuality and considered as human sexual relations to be natural as those shared by men and women, not by men and men or women and women.
- **Spreading of diseases like HIV/AIDS:**
  By decriminalising homosexuality, it will spread the diseases like HIV and AIDS. Many people are of view that by this, the diseases of HIV/AIDS will be increased. Apart from that many political leaders also opposed this verdict as it brings the evil of HIV/AIDS from spreading.
- **Intention of the legislature:**
  It is the general rule of interpretation that when interpreting any law, the intention of the legislature must be taken into consideration because it helps the judiciary to know the exact meaning of the statute for which a particular law was enacted. Therefore, in this case, some critics are of opinion that while delivering the judgment for decriminalising sec 377 of the Indian Penal Code, judiciary had to take into consideration the intention of legislature. As this law was enacted in 1864, the intention of the legislature *i.e.* Britishers considered India to be cultural society having moral values, beliefs, ethics, etc as the people of India would never indulge into these kinds of immoral acts. Thus, intention had to be taken into consideration by the judiciary.

4. Conclusion

Everyone has right to freedom guaranteed by Article 21 of the Constitution of India. Some people are in favour of the judgment of Supreme Court, while other people are against the verdict. Decriminalising section 377 provides the LGBT community the right to choose about their sexual orientation and it also provides the freedom of expression to them. Every coin has two sides. Thus, the Supreme Court's verdict of 2018 has also two impacts, both positive and negative impacts. The right of choosing the partners should be left to the people. The judiciary or the legislature should not interfere in that matter, because it is their personal life.

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